IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 247 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE KSHITIJ R.VYAS
and
Hon'ble MR.JUSTICE RAVI R.TRIPATHI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

GOVIND PUNJA RABARI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 247 of 1999

MS BANNA S DUTTA for Petitioner No. 1

Mr.H.H. Patel, ADDL. PUBLIC PROSECUTOR for Respondent No. 1

CORAM : MR.JUSTICE KSHITIJ R.VYAS
and
MR.JUSTICE RAVI R.TRIPATHI

Date of decision: 06/05/2002

ORAL JUDGEMENT (Per : MR.JUSTICE RAVI R.TRIPATHI)

This appeal is filed under section 374(2) of the

Code of Criminal Procedure, 1973. It is filed against the judgement and order dated 26.2.1999 rendered by the learned Additional Sessions Judge, Sabarkantha at Modasa in Sessions Case No.8 of 1994 by which the appellant is convicted under sec.15 of the Narcotic Drugs & Psychotropic Substances Act, 1985 ("NDPS Act" for short) and is punished with rigorous imprisonment for 10 years and fine of Rs.1 lakh, in default to undergo rigorous imprisonment for one year.

2. On 24.8.1994, when Police Sub Inspector, Bayad was returning from village Bormadh to Bayad after investigation of an offence registered at C.R. No.80 of 1994 of Bayad Police Station, he received an information from an informant that a person who is tall and wearing Khaki Kameez is coming from Rajasthan in an ST Bus with 'Posh-na-Doda' (Poppy straw). The Police officer on receipt of this information, proceeded to the Bus Stand. He sent Head Constable, Raghuvirsinh to call Executive Magistrate. On arrival of the Executive Magistrate, two persons were called and they were apprised of the information. On their showing willingness to be the Panch witnesses, they all stood at the gate of the Bus Stand, near Octroi Naka. A person answering the description was noticed, who was coming from the Bus Stand side. He had a hand bag on his shoulder. He was stopped and his name was inquired. He replied that his name was Govind Puja Rabari, a resident of Village Nandod, Rajasthan. On inquiry about the contents of the hand bag, he hesitated in giving reply. Therefore, in presence of the Panchas the bag was opened. It was found that it contained, 'poppy straw' in a plastic bag. Before undertaking this exercise the Police party and the Executive Magistrate gave their introduction and search to the accused.

To an inquiry as to whether the accused had any pass or permit to possess the 'poppy straw', he replied in negative. Police Constable Kantibhai Kalabhai was sent to call a person, with weighing scale and measurement. He called one Kiritkumar Shanabhai with weighing scale and measurement. On weighing the 'poppy straw', it was found to be 1.5 KG.

3. From the contraband, poppy straw 100 grams poppy straw was taken out. It was kept in a paper bag, then same was kept in a cloth bag. A slip containing signatures of the Panchas, the executive magistrate and the Police officer was tied on that cloth bag and wax seal containing inscription of "PSI, Bayad Police Station" was affixed. Remaining poppy straw was allowed

to remain in the same plastic bag. The bag was closed by tying. Thereafter a slip containing signatures of Panchas, the executive magistrate and the Police officer was tied on that plastic bag. The papers along with the Muddamal, the accused were taken to Bayad Police Station where they were kept in custody. The Muddamal sample in a sealed condition was sent to Forensic Science Laboratory with a Police Constable. The Police officer sent intimation by a wireless message to the DSP and also to the Divisional Police Officer. The report of the analysis indicated that the substance analysed was 'poppy straw' as defied in NDPS Act. Charge sheet was filed by PSI Mr.Raghav for an offence punishable under sec.15 of the NDPS Act in the court of learned Sessions Judge, Sabarkantha at Modasa.

4. The learned Judge framed charge at exh.7 against the appellant for an offence under sec.15 of the Act. Charge was read over and explained to the appellant. The accused pleaded, 'not guilty' to the same and came to be tried. The prosecution examined Scientific Officer Mrs. Rajnikanta Narendrakumar as PW2, exh.14; PW3, exh.21, Takhatsinh Pujesinh Chauhan; PW4, exh.26 Rupabhai Jivabhai Damor; PW5, exh.29 Raghuvirsinh Nagarsinh, the Police Constable who had gone to call the Executive Magistrate, Bayad; PW6, exh.30, Narendrakumar Parshottambhai, Panch witness to the Panchnama; PW7, exh.32, Gulamnabi Usmanbhai Mirza, who is second Panch witness; Devisinh Daulatsinh Chauhan, who is the complainant in this case was examined as PW8, exh.33. The prosecution had also produced documentary evidence such as exh.11, report of FSL; receipt issued by FSL, exh.12; exh.27 & 28, the slips bearing signatures of the Panchas; exh.31, Panchnama; exh.34, complaint; exh.35, wireless message, exh.36 xerox copy of the wireless log book; exh.37 Ravangi Nondh (forwarding letter). After the recording of the evidence of the prosecution witnesses was over, the learned Judge explained the appellant the circumstances appearing against him in the evidence of the prosecution witnesses and recorded his statement as required under sec.313 of the Code of Criminal Procedure, 1973. In his statement, the appellant denied the case, but did not lead any evidence in support of his defence, to the effect that the case of the prosecution was false.

5. On appreciation of evidence adduced by the prosecution the learned Judge held that it was proved by the prosecution beyond doubt that the appellant was found in possession of 1.5 KG of poppy straw and that he had committed offence punishable under sec.15 of the NDPS

Act. The learned Judge concluded that it was proved by the prosecution that mandatory provisions contained in various sections of the NDPS Act were complied with and that the appellant could not satisfy the court that breach of any of the mandatory provisions of the Act was committed. After holding that the accused had committed an offence punishable under section 15 of the Act, the accused was heard regarding punishment as required by section 235(2) of the Code of the Criminal Procedure. It was pleaded by the appellant that, 'he is a poor person', 'a false case is filed against him', 'he is resident of another State and therefore, mercy be shown to him'. The learned Judge punished the appellant as mentioned earlier by judgment dated 26.2.1999, which gave rise to the present appeal.

6. We considered the submissions advanced by the learned advocate for the appellant-original accused and also reappreciated the entire evidence on the record of the case.

7. The learned advocate Ms.Banna Dutta appearing for the appellant strenuously submitted that in this case the complainant himself has investigated the offence and therefore, complainant and investigating officer is one and the same officer. On this ground also the prosecution must fail and the accused must get the benefit of the settled legal position that the investigation must be fair for which it is necessary that the investigating officer be different than the complainant. Except this contention no other contention is raised by the learned advocate.

8. In the present case the Police officer, Mr.D.D. Chauhan who was serving as PSI, Bayad on the relevant date, i.e. on 24.8.1994 was investigating an offence registered as C.R. No.80 of 1994 at Bayad Police Station. He was at Village Bormadh and from there he was returning to Bayad. On the way he was given an information by his informant that a tall person wearing Khaki Kameez is coming from Rajasthan in an S.T. Bus with (Posh na Doda) 'poppy straw'. On receiving this information the Police officer came to the Bus Stand and sent Head Constable Raghuvirsinh to call the Executive Magistrate. On arrival of the Executive Magistrate, Police officer called two persons to be Panch witnesses. The persons expressed their willingness to be Panch witnesses. The party arranged a watch on the gate of the S.T. Bus Stand, near Jakat Naka. During the said watch, a person answering the description, given by the informant, a tall person wearing Khaki Kameez, was

spotted. He was coming from the Bus Stand side. He was having a hand bag hanging on his shoulder. He was stopped by the Police Party and on inquiry he disclosed his name to be Govind Puja Rabari, resident of Village Nandod, Rajasthan. When he was inquired as to what the hand bag contains, he was hesitating to give reply. Therefore, in presence of the Panchas, the hand bag was opened and a plastic bag was found containing 'poppy straw'. It is deposed by the Police officer that before undertaking the aforesaid exercise the Executive Magistrate and the Police officer had introduced themselves and had also given search. The accused was also inquired as to whether he is in possession of any pass or permit to possess the contraband poppy straw, to which the answer was in negative. Hence the Police Constable Kantibhai Kalabhai was sent to call a person with weighing scale and measurements. One Kiritkumar Shanabhai was called, who had come with a weighing scale and measurements. On weighing the poppy straw it was found to be 1.5 KG. Thereafter, sample was drawn. 100 grams of poppy straw was taken out and was kept in a paper bag, which was then kept in a cloth bag and a slip containing signatures of the Panchas, the Executive Magistrate and the Police officer, PSI, Bayad was tied on the said bag and it was sealed with a seal bearing inscription, "PSI, Bayad Police Station". The remaining contraband substance was allowed to remain as it is. It was closed by tying and thereafter a slip containing signatures of the Panchas, the Executive Magistrate and the Police officer was put on the said bag. The accused, the muddamal and the papers were brought to the Police Station where muddamal was kept in the custody. Thereafter, the sample Muddamal was sent to the Forensic Science Laboratory in sealed condition. To prove this, the prosecution had examined Police Constable Takhatsinh, PW3, exh.21, who has deposed that on 6.9.1994 he was discharging his duties at Bayad Police Station. At that time in connection with the offence registered at Bayad Police Station being C.R. No.III-237 of 1994, he was given muddamal of poppy straw with a forwarding letter (Ravangi Yadi) by the Writer Head, which was in sealed condition. He had taken the same after verifying its sealed condition and the same was then delivered at the Forensic Science Laboratory, Ahmedabad in sealed condition. When it was given at Forensic Science Laboratory it was in sealed condition. The Forensic Science Laboratory had issued a receipt for having received the parcel. A copy of the receipt issued by the Forensic Science Laboratory is produced at exh.12 wherein it is mentioned that one sealed parcel is received today. Date of receipt is 6.9.1994. Said factum is also borne

out from the Forensic Science Laboratory report which is produced at exh.11. It is mentioned therein that one sealed cloth bag-parcel was received bearing a seal with inscription, "PSI, Bayad Police Station". The seal was that of wax and the same was intact and was tallying with the sample sent thereof. The next portion of the said report sates that the paper slip found on the sealed cloth parcel was containing information as set out in the report. There were signatures of one Patel Narendrakumar Parsottambhai, and another Gulamnabi U. Mirza, both in Gujarati, and a signature which was made to show that the aforesaid two signatures were made in the presence of the Executive Magistrate, Bayad. Thus, possibility of any tampering with the muddamal was ruled out. Not only that there is no question of the said muddamal having not reached the Forensic Science Laboratory in the same sealed condition in which it was sealed at the time of drawing Panchnama and in which it was forwarded from Bayad Police Station.

The opinion of the Forensic Science Laboratory reads as under:

> "On the basis of chemical analysis and botanical examinations, the contents of the exhibit noted above have been found to be poppy straw as defined in the NDPS Act, 1985."

9. The officer concerned filed the complaint which is at exh.34. The Panchnama was drawn which is exhibited at exh.31, which bears signature of two Panchas, namely, Patel Narendrakumar Parsottambhai, and Gulamnabi U. Mirza and there are two other signatures depicting that the earlier two signatures are made in presence of the signatories, i.e. PSI, Bayad and the Executive Magistrate, Bayad. At one stage, learned advocate for the appellant submitted that both the Panchas have not supported the Panchnama. Said submission has no substance inasmuch as we have examined the deposition of Patel Narendrakumar Parsottambhai, who is Panch witness no.1, who has said that on 24.8.1994 at about 6.50 PM, the Police had called him near Bayad Depot and he has also deposed that the other Panch was Gulamnabi U. Mirza. Thereafter, he has stated that somebody from Rajasthan has come but I do not know as to what he possessed. He has also stated that there was something inside and Panchnama was drawn but what was that substance I do not know. He was declared hostile. Thereafter he has stated in his cross examination that it is true that the Panchas, PSI, the Executive Magistrate and the Police personnel were present. At that time the

accused had come and that he had a cloth bag. What is important to be noted is, that in the present case Panchnama is drawn in presence of the Executive Magistrate who was called by the Police officer soonafter the information was received by him from his informant. The Executive Magistrate had also remained present during watch and on spotting the accused the entire proceedings were taken in presence of the executive magistrate. This Court has no reason to doubt the veracity of the Panchnama, drawn in presence of the Executive Magistrate, who is examined as PW4, exh.26. The Court is conscious of various decisions of the Honourable the Apex Court wherein it is laid down that even in absence of a supporting Panch witness, a Panchnama can be believed relying on the deposition of the Police officer. In such cases, a duty is cast upon the Court to the effect that the Court has to be extra vigilant while appreciating and accepting the evidence in the nature of Panchnama. In the present case, the executive magistrate has supported the Panchnama in toto. The Police officer has given supporting evidence and even from the deposition of the two Panchas it is clear that the factum of drawing a Panchnama is not denied by the Panch witnesses. He did say that on 24.8.1994 at 6.50 PM he was called by the Police at Bayad. The other Panch witness was one Gulamnabi Usmanbhai Mirza. He has further deposed that what was done at that time was, a person who had come from Rajasthan was being searched and something was found from him. What was that substance he does not know. In light of the aforesaid deposition of the Panch witness this Court finds it safe to rely upon the evidence produced by the prosecution on record of the case and once the evidence produced by the prosecution. Once the evidence produced by the prosecution is found reliable even by this Court, there is no reason for which the conclusions recorded by the learned Judge can be interfered with. We find ourselves in full agreement with the learned Sessions Judge.

10. So far as the contention raised by the learned advocate for the appellant-accused is concerned that the complainant himself was the investigating officer. The learned advocate is not able to point out any prejudice having been caused to the appellant by the aforesaid fact. Besides that she is also not able to support the said contention in light of the fact that it is specifically stated by the complainant that the charge sheet was filed by PSI Mr.Raghav. The necessary presumption will arise that it was the PSI Mr.Raghav who had investigated the matter and not the complainant. We are conscious of the fact that after raising a contention

that the investigation was carried out by the complainant himself, the next plea which is required to be taken by the appellant is that a prejudice is caused to the appellant. Learned advocate appearing for the appellant submitted that it is stated by the deponent, PW 8, exh.33 during his cross examination that Panchnama was drawn in his presence and that he had recorded the statement of the Police personnel. A solitary sentence cannot be read in isolation. When the evidence of a witness is to be appreciated, the same is required to be appreciated as a whole. In the present case, the deponent has stated in so many words that he had arrested the accused and as there was sufficient evidence against the accused, PSI Mr.Raghav filed the charge sheet. In his cross examination also he has stated that it is not true that in this case he has filed the complaint and investigation is also done by him. The next sentence is, "Panchnama was drawn in my presence and I had recorded the statement of the Police." This cannot be the basis to hold that it was the complainant who had investigated the offence. We found submissions made by the learned Additional Public Prosecutor, Mr.H.H. Patel acceptable that in cases like the one on hand there is hardly anything left for the Investigating Officer to do because the entire case of the prosecution depends on the Panchnama drawn at the time of seizure of the contraband substance. In the present case the Police officer had kept present the Executive Magistrate at the time of search and seizure of the contraband substance that too in a public place. It was in his presence that the accused was interrogated and thereafter the hand bag which was hanging on his shoulder was opened and the poppy straw was found. In view of the aforesaid facts and in view of the fact that it is not even remotely suggested that the Executive Magistrate has any reason to falsely implicate the present appellant, we turn down the only contention/ submission made by the learned advocate for the appellant.

11. In view of the aforesaid discussion and for the foregoing reasons, the Appeal fails. The conviction of the appellant recorded under section 15 of the NDPS Act as well as punishment imposed for commission of the said offence are hereby maintained. Muddamal to be disposed of in terms of the directions given by the learned Judge in the impugned judgement.

(KSHITIJ R. VYAS, J.)

(RAVI R. TRIPATHI, J.)

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